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No. 217.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

JOSEPHINE OSS et al.,
Petitioners,

v.

THE BOARD OF EDUCATION OF THE CITY OF KNOXVILLE, TENNESSEE, et al.

HENRY C. MAXWELL, JR., et al.
Petitioners,

v.

THE COUNTY BOARD OF EDUCATION OF DAVIDSON COUNTY, TENNESSEE, et al.

BRIEF

of Board of Education of Knoxville, Tennessee,
In Opposition to the Petition for Writs of Certiorari
to the United States Court of Appeals for
the Sixth Circuit.

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INDEX.

	Page
Ground Upon Which the Writ Should Be Denied	1
Question Presented	2
Argument	3
Conclusion	6

Cases Cited.

Boson v. Rippy, 285 F. 2d 43 (Fifth Cir. 1960) 2, 4

Brown v. Board of Education, 349 U. S. 294 (1955) .. 2

Brown v. Board of Education, 347 U. S. 483 (1954) .. 2

Kelley v. Board of Education, 270 F. 2d 209 (Cert. denied, 361 U. S. 924) 5

No. 217.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

JOSEPHINE GOSS et al.,
Petitioners,

v.

THE BOARD OF EDUCATION OF THE CITY OF KNOXVILLE, TENNESSEE, et al.

HENRY C. MAXWELL, JR., et al.
Petitioners,

v.

THE COUNTY BOARD OF EDUCATION OF DAVIDSON COUNTY, TENNESSEE, et al.

BRIEF

Of Board of Education of Knoxville, Tennessee, In Opposition to the Petition for Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit.

GROUND UPON WHICH THE WRIT SHOULD BE DENIED.

The Court of Appeals, Sixth Circuit, has not rendered a decision in this case in conflict with applicable decisions of the Supreme Court of the United States.

If that proposition be established, then any conflict of decision in this case with that in **Bosco v. Rippy** (C. A. 5), 285 F. 2d 43, should not be ground for reviewing the case. Both cases are concerned with the correct interpretation of this Court's decision in the **Brown** case, 349 U. S. 294 (1955), and if the decision of **Goss v. Board of Education** correctly interprets this Court's opinions, the denial of the petition for writs of certiorari will establish the error of **Bosco v. Rippy** so far as that decision is in conflict. Furthermore, the conflict of **Goss** with **Bosco** is more apparent than real, as hereinafter indicated.

QUESTION PRESENTED.

Whether the decision of the Court of Appeals in this case conflicts with **Brown v. Board of Education**, 347 U. S. 483 (1954), 349 U. S. 294 (1955), in approving a pupil transfer plan which entitles a pupil, either Negro or white, to transfer out of a school theretofore used only by the other race, or having a membership predominantly of the other race, or in which the pupil is placed in a class predominantly of the other race.

ARGUMENT.

The color line is not being illegally drawn when the school board transfers a child upon his voluntary request based upon the true assertion that he will learn better, with less interruption, at the other school. The validity of this as justification for requested transfer is not diminished because it happens that it stems from preponderance of a different race in the school. It could stem from differences in religion, or from personal peculiarities of the child applicant, or any one of many reasons having nothing to do with race.

The plaintiffs have not attacked the new zone map (Exhibit 13, R. Goss, 75a) and must concede that the new zoning is reasonable. Thus the Negroes' segregation, so far as it actually exists under this transfer plan, is due solely to the clustering of their homes in such way that properly determined school zones in which they reside are preponderantly Negro. The process of desegregation in Knoxville will not find communities of Negro and white homes equally and thoroughly mixed together, but typically faces the problem of one race being absent or in a small minority in each community.

If a child is denied disadvantage due to race as a ground for transfer, this goes beyond mere protection of the Negro child's Fourteenth Amendment rights and hobbles the school board in the performance of its duty to educate all pupils the best way it can. In this it cannot avoid dealing with the results of concentration of Negroes in one place and whites in another. When a pupil makes a voluntary application for transfer in the interest of better schooling atmosphere for himself, the board is obligated to help him out.

The transfer of that child, whether white or black, is not in itself a racial denial of another child's application:

and if the latter does make an application which is denied because not reasonably indicative of an improved class room atmosphere and an improved peace of mind in the child, the denial is not a racially discriminatory act, but is simply an act of enforcement of the policy that no transfer shall be granted without good reason.

In **Boson v. Rippy** (C. A. 5, 1960), 285 F. 2d 43, the same transfer provisions here involved were held unconstitutional under this reasoning:

> "Nevertheless, with deference to the views of the Sixth Circuit, it seems to us that classification according to race for purpose of transfer is hardly less unconstitutional than such classification for purposes of original assignment to a public school."

In the quoted language, the Court has overlooked the voluntary aspect of the application for transfer, as contrasted with the compulsory nature of the assignments to schools under the old system of segregation. The former is the act of the individual; the latter is the act of the state. Only the latter is proscribed.

On the facts of this record there is no conflict with **Boson v. Rippy** for that case recognizes that this transfer plan can be constitutionally applied to relieve the disadvantages or maladjustments due to preponderance of the other race. 285 F. 2d 49. The transfer officer of the Knoxville Board of Education testified thus:

> "Q. Explain in your own words just how this transfer plan will work. A. It will work just exactly, so far as I am concerned, if I am delegated to continue, it will work just exactly like I have done it for 23 years.
>
> "The only difference is now that a Negro child can apply for transfer to a white school where before he

could not, and vice versa. And so far as I am concerned, it will be handled just exactly like it was when he applied for one to his own race.

"Q. I ask you this, Mr. Marable: Say if there is a white child, under the new plan, if there is a white child living in the Eastport School district, which is a Negro school district, on the east side, and wanted to transfer to Park Lowery elementary school, which now is a so-called white district, would he be allowed to do it? A. Well, as I stated a minute ago, he would have that privilege, and if it came to me, it would get serious consideration just exactly the same I have done it before now only I would forget that he was colored and the school was white. It wouldn't be——

"Q. Let's take a Negro child living in the Park Lowry School district which is a white school district and wanted to transfer to Eastport or Green which are Negro school districts. He would be allowed to do it under this plan, would he not? A. The very same way except we would forget he is Negro or a white child. If a white child wants to transfer to Green and applies for a transfer, he will get the same consideration. Only I just forget it is Negro and white."

The opinion upon this subject expressed in **Kelley v. Board of Education**, 270 F. 2d 209, at p. 228 et seq., is entirely sound. We refrain from elaboration, because the pertinent part of that opinion is freely quoted in the reply of the County Board of Education, to the petition for writ of certiorari filed in the companion case of **Maxwell v. County Board of Education of Davidson County**. We fully concur in the arguments of that reply.

CONCLUSION.

The petition should be denied because the decision of the Court of Appeals in the **Goss** case does not conflict with applicable decisions of this Court.

Respectfully submitted,

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